Supreme Court U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

DAVID BAXTER, individually, and the CITY OF MURFREESBORO,

Petitioners,

vs.

JOHN W. REED and HENRY SHARBER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the attorney-client privilege protect communications between a city attorney and two city councilmen, the city manager, and the city fire chief, which involve pending litigation and possible future litigation against the public body?

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Petitioner, David Baxter, individually, and the City of Murfreesboro, (hereinafter the "City") respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Reed v. Baxter*, 134 F.3d 351 (6th Cir. 1998) (App. A). The opinion of the district court in *Reed v. Baxter*, No. 3:93-0998 is not published. (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on January 9, 1998. The Court of Appeals denied a timely petition for rehearing on March 5, 1998 (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 26(b)(3) provides, in pertinent part:

> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(2) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant,

surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

STATEMENT OF THE CASE

A. Factual Background

This case arises out of a claim of racial discrimination brought by John Reed and Henry Sharber ("Respondents"), two white employees of the Murfreesboro Fire Department, against Fire Chief David Baxter and the City of Murfreesboro ("Petitioners"). Respondents allege that the process used by the Murfreesboro Fire Department ("Department") in promoting an African American to a Captain's position for which they had applied discriminated against them on the basis of race in violation of Title VII of the Civil Rights Act of 1964.

In 1992, a Captain's position in the Murfreesboro Fire Department became vacant. The standard to apply for Captain was four years' service on the job, with one year as a driver. The open position was posted by a memorandum on the bulletin boards at all Fire Stations on November 5, 1992. (Joint Appendix for Court of Appeals proceeding [hereinafter referred to as "J.A."] 145-149).

The Department policy for promotion provided that a combination of test scores, seniority, and fire certification would be used to pick three people who would then be interviewed by Fire Chief David Baxter, who would recommend one to be promoted. The actual decision as to who would be promoted would be made by City Manager Roger Haley, who could either accept or reject Baxter's recommendation. (J.A. 145-146, 168-169, 184-185). The Department policy for promotion clearly provided that although there were various factors involved in selecting applicants, the Chief reserved the right to change the policy at any time as he deemed necessary. Included in the posting on the bulletin board was the statement that amendments to the policy would be made as needed. (J.A. 171).

As part of the promotion process, applicants took a written test which was graded by the Department Promotion Board. The Promotion Board consisted of six Captains and was overseen by Training Officer Billy Vinson. At Chief Baxter's request, Officer Vinson prepared a test from training manuals, standard department procedures, and information he had obtained from the state fire school. The contents of the test were kept secret from everyone until the test was administered. (J.A. 148, 173)

On Thursday, December 3, 1992, Officer Vinson gave the test to sixteen applicants. So that testing would remain anonymous, the applicants used their Social Security number only. Mr. Vinson kept the tests secured until later that day when five other Captains who were members of the Promotion Board joined Mr. Vinson to grade the test. Before grading the test, the Promotion Board reviewed the test in order to agree on the correct answers and to create a uniform grading key. This was the first time the other five Captains had seen the test. Controversy arose over the test immediately. It was suggested that it was a bad test and that the results should not be used as a

basis for promotion. Ultimately the Board decided to grade the test, but it was decided that five of the 100 questions should not be included. Ultimately, the Board decided to give every applicant credit for those five questions. Race was never discussed or involved in any of these decisions. (J.A. 157, 175, 199).

The Board agreed on three Social Security numbers to be given to the Fire Chief, which represented the top candidates pursuant to the initial promotion procedure. Chief Baxter determined that the three people represented by the three numbers given to him were John Swader, who is black, Henry Sharber, who is white, and Thomas Adams, who is white. (J.A. 67, 177)

On the morning of Friday, December 4, 1992, Officer Vinson re-checked the mathematical calculations on the tests. He found that the three numbers given to the Chief were not the correct ones. Officer Vinson reported that the test score of one candidate had been miscalculated by the Board and that the error changed the top three candidates. (J.A. 153, 176). When Chief Baxter learned of this problem, he was upset at the error, especially since there had been problems with the test in the past. He then asked for the top five numbers instead of the top three candidates, since he did not want to take away from the three candidates who had already been identified. (J.A. 130, 153-154, 194). In the interim between the initial list of three and the submission of the next list of five, Officer Vinson submitted another list of three candidates. There was no discussion between Chief Baxter and Officer Vinson concerning the race of any of the people who were on this list. (J.A. 177)

On Monday, December 7, 1992, Officer Vinson submitted five names to the Chief that he certified were the top five candidates using the initial promotion criteria. The persons

represented by the Social Security numbers on the list were Henry Sharber, Bill Reed, Thomas Adams, John Swader, and Thomas McClain. Sharber, Reed, and Adams were white. Swader and McClain were black. Chief Baxter was not involved in deciding who the five people on the list would be or who the people on the previous lists would be. (J.A. 130-131, 178-179).

On that same day, Chief Baxter received a grievance filed by one of the drivers, Eddie Mitchell, who had taken the test. The hearing procedure allowed for a hearing on certain policy and personnel issues. Mitchell claimed the test was not fair because some of the questions had multiple answers. On Tuesday, December 8, 1992, a hearing was held by the Department Grievance Committee, a different group from the Promotion Board. The Committee consists of a Captain who is not on the Promotion Board, a driver, and a firefighter. The Committee issued an opinion to the Chief that the test was not fair and recommended that the test scores be declared null and void. (J.A. 158, 172, 197). They also recommended that a new test be formulated and that everyone who applied should be re-tested. (J.A. 158, 172).

Meanwhile, Officer Vinson reviewed the tests with each applicant. While doing this he discovered that four more of the tests had been misgraded. He reported these additional problems to Chief Baxter. Chief Baxter also reviewed the test and came to the conclusion that the test contained numerous and unsolvable problems. Consequently, Chief Baxter decided that he did not want to use the test as a basis for his promotion decision. (J.A. 60). Chief Baxter and Officer Vinson investigated the idea of obtaining a standardized test created by an independent agency from outside the Department and concluded that while it was possible to obtain such a test, it would cost several thousand dollars. More importantly, this would leave

the Captain's position vacant for several more months during the dead of winter, which is the time when fires are most prevalent.

Chief Baxter directed Officer Vinson to determine whether all applicants had made a passing grade on the test. Chief Baxter was informed by Officer Vinson that all applicants had passed the test. (J.A. 178-179). Chief Baxter then told Officer Vinson to give each applicant equal credit for having passed the test and determine the top three applicants based on passing the test and the other two portions of the policy — length of service and fire certification. Chief Baxter did not know who the top three applicants based on this criteria would be, nor did Chief Baxter know the race of these individuals. (J.A. 163).

Pursuant to Chief Baxter's request, Officer Vinson went to the department records and calculated each applicant's length of service and fire certification. He gave each applicant credit for having passed the tainted test. He then gave the Chief three names as being the top three candidates under this criteria. Those names were Thomas Adams, Thomas McClain and Emmett Young. (J.A. 163, 179, 201). Thomas Adams is white; Thomas McClain and Emmett Young are black. Neither of the Respondents Reed and Sharber were in the final list submitted to Chief Baxter for the one vacancy that was open. (J.A. 164, 201).

Chief Baxter interviewed Mr. Adams, Mr. McClain and Mr. Young on December 14, 1992. On December 15, 1992, he recommended to City Manager Roger Haley by written memorandum that he promote Emmett Young to the Captain's position. (J.A. 204). At that time, Mr. Young had eighteen years of service with the City of Murfreesboro and had previously served as an Instructor/Captain in 1987. Chief Baxter also informed City Manager Roger Haley about the problems in

testing and how the final three names were derived. Chief Baxter informed Mr. Haley that due to these problems, a new promotional system for the future would be devised and sent to him. (J.A. 202).

City Manager Haley promoted Emmett Young on December 15, 1992, to be effective on December 26, 1992. Captain Young has served effectively in that position and continues to serve as a Captain currently.

B. The Proceedings Below

Respondents filed suit in district court on December 12, 1993, alleging that Petitioners discriminated against them in promoting a less qualified African American to a captain's position for which Respondents had applied. During discovery, Respondents issued subpoenas to take the depositions of Thomas Reed, Attorney for the City of Murfreesboro, and Christopher Bratcher and Jack Ross, two members of the Murfreesboro City Council. Petitioners filed a Motion to Quash the Subpoenas and for a Protective Order on the basis that the depositions were expected to inquire into a privileged attorney-client discussion that occurred on December 16, 1992, between the city attorney, the two city council members named, the city manager, and the fire chief. The district court found that in the December 16, 1992 meeting, which would clearly be a major topic in the depositions sought to be taken, the parties discussed pending litigation involving the vacancy in the captain's position, and Mr. Reed was acting as city attorney during the meeting. (J.A. 62-63). The district court denied the Motion to Quash but granted a Protective Order limiting the scope of discovery and ordering that Respondents not inquire into areas in which attorney-client privilege or attorney work product existed. (J.A. 62-63). Respondents took the depositions of Jack Ross and Christopher Bratcher on August 23, 1994 but did not depose City Attorney Reed.

Prior to trial, Petitioners filed a Motion in Limine to exclude opinion statements by the two councilmen regarding conversations with the city attorney. This Motion was granted in oral ruling by the district court. (J.A. 119). Respondents sought interlocutory appeal, but the appeal was dismissed by the Sixth Circuit for lack of a final appealable order. A bench trial was held in this matter on June 16, 1996. The district court dismissed the case on September 3, 1996 for lack of merit, holding that Respondents had not established a prima facie case of discrimination, and further that Respondents would not have been able to ultimately carry their burden of persuasion even if they had established a prima facie case of discrimination. (J.A. 22-24; App. B, Opinion; App. C, Order).

Respondents appealed to the Sixth Circuit Court of Appeals. The Court of Appeals vacated the judgment of the district court and remanded the case for further proceedings, on the grounds that the district court should not have granted the protective order or issued the pre-trial ruling excluding the testimony in issue because the conversations between the city attorney, city councilmen, city manager and city fire chief were not protected by the attorney-client privilege. (App. A). One justice filed a dissenting opinion, submitting that the conversations were protected by the attorney-client privilege and were properly excluded from evidence. Petitioners filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on March 5, 1998. (App. D).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE, AND SPECIFICALLY WITH THE RULING IN *UPJOHN CO. v. UNITED STATES.*

The City's petition for writ of certiorari should be granted because the opinion below conflicts with this Court's prior rulings on the application of the attorney-client privilege, and specifically with this Court's ruling in *Upjohn Co. v. United States,* 499 U.S. 383 (1981). Upon the hearing held in this matter, the Court of Appeals held that the testimony in issue was not subject to the attorney-client privilege because the city councilmen were not acting as "clients" of the city attorney during the meeting in issue. The basis for the appellate court's reasoning was that the interests of the city councilmen were adverse to those of the city manager and city fire chief who were present, since the city councilmen played no role in the promotion which was under discussion. The appellate court's holding is in conflict with this Court's prior rulings on the application of the attorney-client privilege.

The purpose of the attorney-client privilege is to encourage open and complete communication between the client and attorney by eliminating the possibility of subsequent compelled disclosure of their confidential communications. *United States v. Noriega*, 917 F.2d 1543; *United States v. Suarez*, 820 F.2d 1158 (11th Cir. 1987). The general conditions required for the attorney-client privilege to be applicable were stated in the case of *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 359 (D. Mass. 1950):

The privilege applies only if: (1) the asserted holder of the privilege is or sought to be a client; (2) the person to whom the communication was made (a) is a member of a bar of a court, or his subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing primarily either (i) an opinion on law, or (ii) legal services, or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. *United Shoe*, 89 F. Supp. at 358-59.

The liberal application of the discovery rules is tempered by the constraints imposed by the attorney-client privilege and the related work-product doctrine. *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Hickman v. Taylor*, 329 U.S. 495 (1947).

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law . . . Its purpose is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.

Upjohn, 449 U.S. at 388.

Communications from the attorney to the client are also protected. The attorney-client privilege extends to communications from attorney to client, as well as the reverse. F.R.C.P. 26(b); *Moore v. Tri-City Hosp. Authority*, 118 F.R.D. 646 (N.D. Ga. 1988); *Pitney-Bowes, Inc. v. Mastue*, 86 F.R.D. 444 (S.D. Fla. 1980). An attorney's communications to a client come under the privilege to the extent that they are based on or

contain information provided by the client, or the attorney's legal advice or opinions. *United States v. Margolis*, 557 F.2d 209 (9th Cir. 1977); *Schenet v. Anderson*, 678 F. Supp. 1280 (E.D. Mich. 1988); *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242 (D.C. Cir. 1977). The privilege shields communications from lawyer to client that contain the advice or opinions of the attorney. *United States v. Neal*, 27 F.3d 1035 (5th Cir. 1994).

Communications between attorney and client, *or the client's representative*, are protected by the attorney-client privilege. *John Labatt Ltd. v. Molson Breweries*, 898 F. Supp. 471 (E.D. Mich. 1995). The privilege

> protects communications between the attorney and client made in confidence and for the purpose of obtaining or facilitating the rendition of professional legal services. These can include communications between the client or the client's representative and the lawyer or the lawyer's representative as long as the other conditions for the attorney-client privilege are fulfilled.

Id. at 473. Where the client is an organization, the privilege includes,

> communications between attorneys and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communication.

Falcone v. Internal Revenue Serv., 479 F. Supp. 985, 989 (E.D. Mich. 1979), *citing Mead Data Central v. U.S. Dept. of Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977).

The protection afforded to attorney-client communications also extends to the related work product doctrine. Attorney work product is

> accorded an almost absolute protection from discovery because any slight factual content that such items may have is generally outweighed by the adversary system's interest in maintaining the privacy of an attorney's thought processes and in ensuring that each side relies on its own wit in preparing their respective cases.

Sporck v. Peil, 759 F.2d 312, 316 (3rd Cir. 1985). Rule 26(b)(3) of the Federal Rules of Civil Procedure provides that the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney. In applying the Rule, courts have distinguished between the normal work product of an attorney and opinion work product, with opinion work product given nearly "absolute immunity" from discovery. *In Re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977).

Opinion work product need not be in a tangible form to be protected under the doctrine.

> Whereas such opinions and theories could be in a written, tangible form, it is equally possible that they could reside simply in the intangible thoughts of a party's counsel. Opposing counsel cannot be allowed to gain access to "opinion work product" simply because of the fact that they have not been reduced to a tangible form.

Laxalt v. McClatchy, 116 F.R.D. 438, 441 (D. Nev. 1987). *See also Int'l Business Machines v. Edelstein*, 526 F.2d 37 (2nd

Cir. 1975); *Connolly Data Systems, Inc. v. Victor Technologies, Inc.*, 114 F.R.D. 89 (S.D. Cal. 1987).

In *Upjohn Co. v. United States*, 499 U.S. 383 (1981), this Court expanded the significance of the attorney-client privilege and work product doctrine by rejecting the "control group" test which had been followed by the Sixth Circuit in applying the privilege in the corporate context. In *Upjohn*, the Sixth Circuit had concluded that certain materials were not protected by the attorney-client privilege because the communications were not made by members of the corporation's "control group." *United States v. Upjohn Co.*, 600 F.2d 1223 (6th Cir. 1979). This Court rejected the Sixth Circuit's reasoning, stating that

> [t]he control group test adopted by the court below . . . frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation.

Id. at 392. The court found that the communications at issue were made: by corporate employees who were not members of upper management; to corporate counsel acting as such; while the employees were aware of the legal nature and purpose of the communications; concerning matters within the scope of the employees' duties; to permit the corporation to obtain legal advice; with the expectation that the material would remain confidential; and with the corporation in fact keeping it confidential. *Id.* at 394-395.

The circumstances set forth in the *Upjohn* case as invoking the attorney-client privilege were present in the case at hand. In the meeting at issue, two city councilmen, the city manager, the city fire chief, and the city attorney were discussing ongoing

legal proceedings resulting from the termination of a city employee, as well as whether there was a threat of future litigation resulting from the problems involved in filling the vacant position. Attorney Tom Reed advises Roger Haley, the city manager, and the city council and provides individual councilmen with advice and information on City matters. He has a duty to report to the city council on legal proceedings involving the City. Although this was not a full meeting of the city council, it was concentrated solely on city business and was a closed door meeting. The city councilmen, city fire chief, and city manager, were not present in their personal capacity, but as representatives and officials of the city within the scope of their duty to serve and represent the City. All of the individuals present at the meeting were aware of the legal nature and purpose of the communications, as the communications directly pertained to legal proceedings involving the City.

Also, at the meeting in issue, the city attorney offered legal opinions regarding current litigation, as well as whether the problems involved in filling the captain's position posed a threat of future litigation. The communications made by the city attorney to the city officials were made to representatives of the attorney's client, the City of Murfreesboro, with regard to pending litigation and were offered in the form of legal advice and/or opinion. This is clearly protected under the work product doctrine.

The discussion between the city attorney, two city councilmen, the city manager, and the city fire chief regarding litigation pending against the city and possible future litigation, is protected by the attorney-client privilege under this Court's holding in *Upjohn, supra*, and other related cases. The appellate court's decision conflicts with these holdings. Despite having been reversed by this Court previously on this issue, the Sixth Circuit has again improperly applied the "control group" test

rejected by this Court's holding in *Upjohn*. For this reason, the City's petition for writ of certiorari should be granted.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT CLEARLY BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This case presents an issue of extreme significance to all government entities. The practical effect of the majority holding is that no attorney representing a governmental entity will be able to offer legal advice or discuss legal concerns of the entity with its elected representatives without fear that the discussion would be discoverable and could be used offensively against the entity, unless those representatives are sitting in formal session. This presents an untenable position for attorneys representing governmental entities, as well as the governmental entities themselves, by depriving them of the opportunity to have full and frank legal discussions between their representatives and attorneys. Since most formal sessions of elected governmental officials are open hearings, it would prove, in most instances, impossible for the government attorney to provide confidential legal advice to the representatives and officials of the governmental entity.

Taking into consideration the extreme significance of the appellate court's decision, at the heart of the appellate court's decision in this matter is a question of federal law which has not clearly been, but should be, settled by this Court. The basic issue in the case at hand is under what circumstances communications between an attorney and a governmental entity are protected by the attorney-client privilege. The appellate court

improperly applied a type of "control group" test in holding that the communications were not privileged because the interests of the city councilmen were adverse to those of the other officials present, since they were not directly involved in the decision-making process with respect to the promotion. While the rule set forth in the *Upjohn* case, *supra*, offers some guidance, the issue does not appear to be clearly settled, and the decision below creates even greater uncertainty with respect to this issue.

The court below held that the conversation at issue did not constitute an attorney-client discussion because the interests of the city councilmen were adverse to those of others present. In its opinion, the majority discussed at length the decision of the Eighth Circuit Court of Appeals in *In Re Grand Jury Subpoena Duces Tecum (Office of President v. Office of Indep. Counsel)*, 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997). In that case, the Office of Independent Counsel sought to compel the production of documents subpoenaed by a federal grand jury as part of the Whitewater investigation. 112 F.3d at 910. The documents included notes taken during meetings attended by White House lawyers, Mrs. Clinton, and her lawyers. The White House and Mrs. Clinton asserted that the documents were protected by attorney-client privilege. Because there was no common interest between the White House and Mrs. Clinton, who was acting in her personal capacity and representing her personal interests, the Court held that the meetings were not confidential and not protected by attorney-client privilege. *Id.* at 933-923.

The majority applied the holding of *Office of President*, *supra*, to the case at hand, finding that there was no common interest between the city councilmen and the city fire chief and city manager, and therefore the conversation which took place at the December 16, 1992 meeting was not protected by the

attorney-client privilege. However, the facts in this case are not consistent with the facts present in *Office of President*. In the case at hand, the city councilmen were at all times acting in their capacity as city officials. There would have been absolutely no reason for Councilmen Ross and Bratcher to be present in the closed door meeting except in their capacity as elected city officials. In contrast, in *Office of President*, Mrs. Clinton was acting in a purely personal capacity, not as any government official. 112 F.3d at 922.

Here, the city councilmen shared a common interest with the other individuals present at the meeting. All of the individuals at the meeting were present in their capacity as city officials and employees, who owed a duty to the City to protect the City's interests. It is undisputed that the city councilmen were present at the meeting to discuss the promotion process and policies of the fire department with the city fire chief, city manager, and city attorney. During that meeting, the discussion covered pending litigation between a former fire captain, Henry Knox, and the City. The city attorney gave legal advice and opinions about the current promotion process and the pending litigation, which clearly constituted an attorney-client discussion. As the city attorney stated in his Affidavit,

> On December 19, 1992, in my capacity as City Attorney, I met in the City Manager's office with City Councilmen, Chris Bratcher and Jack Ross. There was no one present in the room who would not be subject to the attorney-client privilege of confidentiality. At the time of the discussion, the Henry W. Knox EEOC claim (and possible federal litigation under Title VII of the Civil Rights Act of 1964) was pending. Councilman Ross mentioned possible court action as a result of the problems in filling the captain's position created by the

> termination of Henry W. Knox. There was a frank and open lawyer-client discussion in the City Manager's office on December 16, 1992.

Reed Affidavit at 3. Even if the city councilmen were present at the meeting initially to discuss promotion procedures used by the city fire chief and city manager, once the conversation turned to pending litigation against the City, the interests of all of those present became the same, and an attorney-client relationship existed. As held in *United States v. United Shoe Machinery Corp.*, 80 F. Supp. 357 (D. Mass. 1950), "the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice." 89 F. Supp. at 359. The interest and duty of all of those present was to discuss and protect the legal interests of the City. As the City's governing body, the city council and individual council members obviously have an interest in reviewing legal matters involving the City and protecting the City's legal interests in those matters.

With respect to whether a common interest exists between government officials who are all acting on behalf of one governmental entity, but perhaps with different positions on the topic, the Sixth Circuit had in fact previously decided the case of *In re Grand Jury Supboena (United States v. Doe)*, 886 F.2d 135 (6th Cir. 1989). In that case, the Sixth Circuit addressed the applicability of the attorney-client privilege in the governmental context and reversed a district court's holding that a city council meeting involving condemnation proceedings did not include any confidential attorney-client communications because the city council was not a client of the attorney present at the meeting. The court held that a distinction between the position advocated by the council and that of the administration did not create adverse interests which would preclude the application of the attorney-client privilege. Even though the

city council questioned the terms of the consent judgment being discussed, the court held there was not a distinction between the positions advocated by the council and the administration. *Id.* at 137-138. In the case at hand, the majority below distinguished the holding in *Doe* from the present case because the meeting in issue was not a full meeting of the city council and because they interpreted the interests of the city council and the city manager as not being the same. As discussed above, the court below improperly applied the "control group" test in reaching this conclusion.

The holding of the majority below prevents attorneys from effectively communicating with officials of a governmental entity outside of formal session. The holding indicates that any discussion between legal counsel and government officials who may have different opinions regarding the subject matter of the discussion will be unprotected by the attorney-client privilege. This creates an untenable position for attorneys representing governmental entities, as well as governmental entities seeking legal advice. The uncertainty surrounding the application of the attorney-client privilege in this context is extremely significant and creates an important question of federal law. Consequently, the City's petition for writ of certiorari should be granted.

CONCLUSION

As stated by this Court in *Upjohn*, *supra*,

> If the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some particular degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

449 U.S. at 684. The majority opinion of the appellate court below creates extreme uncertainty regarding the application of the attorney-client privilege in the governmental context and is in direct conflict with prior rulings of this Court. This case presents a question of extreme significance, as the effect of the lower court's holding is to deny not just the City of Murfreesboro, Tennessee, but all governmental entities *ad infinitum*, the ability to obtain full and frank legal advice from an attorney.

Accordingly, Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JANUARY 9, 1998

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN W. REED; HENRY SHARBER,
Plaintiffs-Appellants,

v.

DAVID BAXTER, Individually; CITY OF MURFREESBORO,
Defendants-Appellees.

No. 96-6384

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 93-00998--John T. Nixon, Chief District Judge.

Argued: September 11, 1997

Decided and Filed: January 9, 1998

Before: MERRITT, JONES, and NORRIS, Circuit Judges.

COUNSEL

ARGUED: Phillip L. Davidson, Nashville, Tennessee, for Appellants. Larry G. Trail, TRAIL & TAYLOR, Murfreesboro, Tennessee, for Appellees. **ON BRIEF:**

Phillip L. Davidson, Nashville, Tennessee, for Appellants. Larry G. Trail, TRAIL & TAYLOR, Murfreesboro, Tennessee, for Appellees.

MERRITT, J., delivered the opinion of the court, in which NORRIS, J., joined. JONES, J. (pp. 15-19), delivered a separate dissenting opinion.

OPINION

MERRITT, Circuit Judge. In this reverse discrimination case, two white firefighters appeal the dismissal of their action brought against the City of Murfreesboro, Tennessee and the city's fire chief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. The plaintiffs allege and offer some evidence to show that an African-American man was promoted to the rank of captain purely on the basis of his race, without regard to the respective qualifications of the candidates. They maintain that the District Court misapplied the law of the attorney-client privilege in two rulings regarding a meeting among the city attorney and other city officials. The plaintiffs contend that these rulings excluded crucial evidence that would have allowed them to prevail at trial. In response, the defendants argue that the plaintiffs have waived their right to appeal the District Court's rulings by failing to offer proof sufficient to preserve the issue for appeal. Although the plaintiffs failed to take steps that would have more clearly preserved the privilege issue for appeal, we conclude that they did enough in light of the District Court's broad rulings. The District Court's rulings rested on a misapplication of the law of the attorney-client privilege and denied plaintiffs the full opportunity to present their case at trial. Therefore, we vacate the judgment of the District Court and remand the case for further proceedings.

Appendix A

I.

In 1992 the Murfreesboro Fire Department took steps to fill a captain's position left vacant when Henry Knox, a black man, was fired. The Department notified prospective candidates that it would select three finalists for promotion to the position based on a combination of test scores, length of service, and number of state certifications. Defendant Baxter was to interview the finalists and recommend one of them to City Manager Roger Haley for the promotion.

In December 1992, the plaintiffs and others took a written test created by the Department's Training Officer, Billy Vinson. After the test was graded, Vinson transmitted to the Chief a list of the three applicants most qualified for the position based on the initial promotion criteria—plaintiff Henry Sharber, another white applicant, and an African-American candidate. Vinson then double-checked the results and determined that the list he had sent to Chief Baxter failed to include one candidate who should have ranked among the top three. Chief Baxter requested a list of the top five candidates based on the original criteria. The new list, also prepared by Vinson, included the two plaintiffs, one other white applicant, and two African-American candidates.

As the process continued, more problems arose with the test. The Chief received a grievance by an applicant who claimed that the test was unfair because several of the questions contained multiple correct answers. The Promotion Board determined that five of one hundred questions had multiple correct answers and recommended that all applicants be given credit for those questions. The Department's Grievance Committee recommended to the Chief that the test results be set aside. In the meantime, Training Officer Vinson determined that at least four other tests had been incorrectly scored.

In light of problems with this and other previously administered tests, Chief Baxter looked into the possibility of obtaining a professionally prepared test. After concluding that cost and time concerns precluded that option, Baxter

asked Vinson to determine whether all of the applicants had achieved a passing score on the test. Upon learning that they had, Baxter decided to nullify the test by giving all applicants equal credit. He then instructed Vinson to prepare a list of the top three candidates using the other two criteria—length of service and number of state certifications.

The finalists on this list included Thomas Adams, who is white, and Thomas McClain and Emmet Young, both of whom are African-Americans. Young had not appeared on any of the prior lists. Chief Baxter interviewed these three individuals and recommended Young to City Manager Haley for promotion. On December 15, 1992, Haley promoted Young, who at the time had eighteen years of service and who had served as an Instructor/Captain in 1987.

On December 16, 1992, the day after the promotion, City Attorney Thomas Reed, Councilmen Christopher Bratcher and Jack Ross, City Manager Haley, and Chief Baxter met in Haley's office. Ross Dep. at 13, R. 26, J.A. at 80. Councilman Ross called the meeting to inquire into the circumstances surrounding Young's promotion. The plaintiffs contend that statements made during this meeting reveal that Young received the promotion purely because of his race. They say that during the meeting, City Attorney Reed informed Councilmen Ross and Bratcher that he had advised the Department to promote an African-American because of the controversy that had arisen out of Henry Knox's termination. The defendants concede that during the meeting Reed disclosed the legal advice he had given City Manager Haley and Chief David Baxter regarding the promotion. Haley Aff. at 1-2, R. 8, J.A. at 53-54; Defs.' Mot. in Limine at 1-2, R. 30.

The plaintiffs filed this action in District Court on December 8, 1993, alleging that the defendants violated Title VII by promoting a less qualified African-American to the captain's position purely on the basis of race. During discovery, the plaintiffs issued subpoenas to depose City Attorney Reed, and Councilmen Bratcher and Ross. The defendants moved to quash the subpoenas or for a protective

order, contending that the depositions would inquire into a conversation protected by the attorney-client privilege.

The District Court denied the defendants' Motion to Quash but invoked its power under Fed. R. Civ. P. 26(c) to grant a protective order instructing the plaintiffs not to inquire into areas protected by the attorney-client privilege or the work product doctrine. Acknowledging that the scope of these areas was unclear, the District Court ordered that the depositions be sealed until it could rule on objections to specific testimony. The court based its order on the following findings: (1) that the parties to the December 16, 1992 meeting discussed pending litigation (i.e., an EEOC claim filed by Henry Knox following his termination) in which the city was a named party; (2) that Reed was acting as city attorney during the meeting; and (3) that Ross and Bratcher were city councilmen at the time of the meeting.

The plaintiffs deposed Councilmen Ross and Bratcher but did not depose Reed. During his deposition, Ross testified that he believed, based on statements made during the meeting of December 16, 1996, that race may have been one of many reasons Emmet Young received the promotion. Bratcher testified that the same statements had given him reason to believe that Young received the promotion because of his race. Neither Ross nor Bratcher discussed specific statements made during the meeting.

During a pretrial hearing, the District Court granted the defendants' motion in limine to exclude the opinions of Councilmen Ross and Bratcher regarding the promotion and testimony regarding statements made during the December 1992 meeting. The court did not state the basis for its ruling, but the parties assume it was based in substantial part on the attorney-client privilege. The plaintiffs sought interlocutory appeal of this ruling. This Court dismissed that appeal for lack of a final appealable order.

A bench trial was held on June 16, 1996. The District Court dismissed the case on September 3, 1996, for lack of merit, holding that the plaintiffs had failed to establish a

prima facie case of discrimination. The court stated that even if the plaintiffs had been able to make a prima facie case, they could not have carried their burden of persuasion.

II.

The defendants assert that even if the District Court's rulings constitute reversible error, the plaintiffs waived their right to appeal by failing to make a complete offer of proof as required under Fed. R. Evid. 103(a). The defendants accurately point out that the plaintiffs failed to offer testimony for the record from Councilman Ross or City Attorney Reed. They also contend that although Bratcher did testify, the plaintiffs made no offer of proof regarding any statements made during the December 1992 meeting. The only offer of proof attempted by the plaintiffs regarded Bratcher's opinion about the promotion determination, which the trial court rejected as irrelevant. Tr. at 21, R. 69, J.A. at 135.

Moreover, the defendants point out that although plaintiffs filed the depositions of Ross and Bratcher with the court during the motion in limine arguments, they never offered these items into evidence at trial. Relying on *Worsham v. Duke*, 220 F.2d 506, 509 (6th Cir. 1955), they argue that the plaintiffs may therefore not attempt to use these depositions as evidence of the testimony that would have been offered regarding the meeting. The defendants assert that without the depositions, there is no direct evidence before this Court regarding the substance of the testimony the plaintiffs sought to introduce. They further contend that even if the depositions are considered, the testimony constitutes statements of the councilmen's opinions regarding the promotion, which are irrelevant with respect to the ultimate issue in the case.

Although the plaintiffs failed to take steps that would have more clearly preserved the attorney-client privilege issue for appeal, the lack of evidence in the record regarding the content of the meeting is attributable primarily to the confusion caused by the District Court's broad rulings excluding in advance any inquiry into evidence that may be

covered under the privilege. Confusion over the scope of the court's protective order is evident in the depositions of Councilmen Ross and Bratcher. During the Bratcher deposition, counsel for the defendants objected as soon as it appeared the plaintiffs' attorney was going to ask about statements made during the December 1992 meeting. Defense counsel stated, "I think the order prohibits you from inquiring directly into things that are covered by [the attorney client privilege]," and "the Court has clearly ruled that the meeting itself was privileged." Bratcher Dep. at 8, R. 27, J.A. at 99. After some debate over the order, plaintiffs' counsel appeared to concede that in light of the court's broad ruling, he could not ask about the meeting. Rather, he simply asked Councilman Bratcher whether he had reason to believe that Young had been promoted because of his race. Bratcher Dep. at 8-9, R. 27, J.A. at 99-100. The same confusion was apparent during the Ross deposition. When plaintiffs' counsel attempted to elicit testimony about the content of statements made at the meeting, Councilman Ross refused to answer on the basis of the protective order. Ross Dep. at 20-21, R. 26, J.A. at 87-88. While plaintiffs' counsel may have been able to extract more specific testimony regarding the meeting through more aggressive questioning, the court's unclear order limited the plaintiffs' ability to put evidence into the record.

The proposed Pre-Trial Order states that "[i]t is the Plaintiffs' position that . . . what was said at [the December 16, 1992] meeting will clearly show that the reason for the promotion of a less qualified black employee over the two more qualified white employees was based on race . . . ." Proposed Pre-Trial Order at 2 (docketed Dec. 1, 1994). In one of their motions in limine, the defendants argued that the conclusions of Ross and Bratcher regarding the role race played in the promotion "are wholly derived from statements made by City Attorney Thomas L. Reed, Jr. in a meeting of December 16, 1992 . . . ." Defs.' Mot. in Limine at 1-2, R. 30. The District Court was aware of the substance and significance of the excluded evidence. In light of the confusion caused by the District Court's orders, we believe

that the plaintiffs took steps sufficient to preserve their right to raise this issue on appeal. *Waltzer v. Transidyne Gen. Corp.*, 697 F.2d 130, 134 (6th Cir. 1983) (excusing failure to make offer of proof where trial court was made aware of general nature of excluded evidence).

III.

The plaintiffs maintain that the District Court's rulings rested on misapplication of the law regarding the attorney-client privilege. They contend that Councilmen Ross and Bratcher participated in the December 1992 meeting as third parties rather than as clients. The plaintiffs maintain that the discussion was not held in confidence and is therefore not entitled to protection from disclosure under the attorney-client privilege. They also contend that the disclosures made at the meeting by the city executive officials had the effect of waiving the privilege.

The question of whether the attorney-client privilege applies is a mixed question of law and fact, subject to de novo review. *See In re Grand Jury Proceedings October 12, 1995*, 78 F.3d 251, 253-54 (6th Cir. 1996). Questions of privilege are to be determined by federal common law in federal question cases. Fed. R. Evid. 501. The elements of the attorney-client privilege are as follows: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived. *Fausek v. White*, 965 F.2d 126, 129 (6th Cir. 1992) (citing *United States v. Goldfarb*, 328 F.2d 280, 281 (6th Cir. 1964)).

The privilege is based on two related principles. The first is that loyalty forms an intrinsic part of the relationship between a lawyer and client in our adversary system. This loyalty is offended if the lawyer is subject to routine examination regarding the client's confidential disclosures. Kenneth S. Broun, et al., *McCormick on Evidence* § 87, at

205-06 (3rd ed. 1984). The second principle is that the privilege encourages clients to make full disclosure to their lawyers. A fully informed lawyer can more effectively serve his client and promote the administration of justice. *Id.* § 87, at 205; *id.* § 89, at 212.

The privilege serves these purposes, but it comes with substantial costs. The privilege excludes relevant evidence and stands "in derogation of the search for the truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). When an organization such as a corporation is the client, the costs imposed by application of the privilege increase. Given the number of employees who may have information relevant to litigation by or against a corporation, administration of the privilege by the courts proves difficult. More significantly, "[w]here corporations are involved, with their large number of agents, masses of documents, and frequent dealings with lawyers, the zone of silence grows large." David Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 Yale L.J. 953, 955 (1956); *see also* 24 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5476, at 189 (1986); *id.* § 5476, at 29 (1997 Supp.) (noting that corporations may use the privilege to prevent the disclosure of information useful to adversaries simply by funneling it through lawyers).

Despite these doubts, it is now well settled that private corporations and other organizations may constitute clients for purposes of the attorney-client privilege. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Proposed Federal Rule of Evidence 503 would have extended this rule to municipal corporations and other governmental entities by defining "client" to include "a person, public officer, or corporation, association, or other organization or entity, either public or private . . . ." Proposed Fed. R. Evid. 503(a)(1) (1972) (rejected by Congress), *reprinted in* Michael H. Graham, *Handbook of Federal Evidence* § 503.1 (4th ed. 1996); *see also Restatement (Third) of the Law Governing Lawyers* § 124 (Proposed Final Draft No. 1, 1996) ("[T]he attorney-client privilege extends to a communication of a

governmental organization . . . ."). Although we have assumed that a governmental entity such as a municipal corporation may invoke the attorney-client privilege, *see In re Grand Jury Subpoena (United States v. Doe)*, 886 F.2d 135 (6th Cir. 1989), we have never explicitly so decided. Because we find that the requirements of the privilege have not been satisfied in the present case, we need not resolve this question today.

Assuming that the privilege applies, "[i]t is appropriate to recognize a privilege 'only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principal of utilizing all rational means for ascertaining truth.'" *Trammel v. United States*, 445 U.S. 40, 50 (1980), *quoted in In Re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 (8th Cir.) (internal quotation marks omitted), *cert. denied sub nom. Office of President v. Office of Indep. Counsel*, — U.S. —, 117 S. Ct. 2482 (1997). Guided by this principle, courts and commentators have cautioned against broadly applying the privilege to governmental entities. *See Restatement (Third) of the Law Governing Lawyers* § 124, cmt. b; 24 Wright and Graham § 5475, at 126. The recognition of a governmental attorney-client privilege imposes the same costs as are imposed in the application of the corporate privilege, but with an added disadvantage. The governmental privilege stands squarely in conflict with the strong public interest in open and honest government. *In re Grand Jury Subpoena Duces Tecum (Office of President v. Office of Indep. Counsel)*, 112 F.3d at 916, 920-21.

Councilmen Ross and Bratcher participated in the December 1992 meeting, along with the city attorney, the city manager, and the fire chief. It is clear that the attorney-client privilege will not shield from disclosure statements made by a client to his or her attorney in the presence of a third party, 8 John Henry Wigmore, *Wigmore on Evidence* § 2311 (3d ed. 1940), but there is little authority about which agents of an organizational client are the client for purposes of the attorney-client privilege. In *In re Grand Jury Subpoena*

(United States v. Doe), 886 F.2d 135 (6th Cir. 1989), our only case to address the issue in a governmental context, we found that the Detroit City Council was a client of the city's attorney with respect to closed condemnation hearings held pursuant to the city code. Accordingly, we held that the District Court had erred in concluding that the city council could not invoke the attorney-client privilege to protect the minutes of the meetings. *Id.* at 138.

In *Doe*, the city attorney called meetings of the full city council pursuant to a provision of the city code providing for formal council approval of condemnation proceedings. *Id.* at 137-38. Because the city code required the city council itself to initiate such proceedings, the *Doe* court concluded that the city and the city council were the same entity for purposes of the attorney-client privilege. *Id.* at 138. The court held that under these circumstances the city council was the client of the city attorney and could invoke the privilege. *Id.* The *Doe* court then remanded the case to the district court to determine whether the privilege would apply, a question that depended on the confidentiality of the communications at issue. *Id.* at 139.

The factors that led the *Doe* court to reach its conclusions are not present in this case. The December 1992 meeting was not a full meeting of the city council called pursuant to any provision of the city code. Councilman Ross called the meeting in response to complaints he had received from constituents about the promotion process. Ross Dep. at 7, R. 26, J.A. at 74. The interests of the councilmen and the interests of the city executives were not the same. The councilmen were not clients at a meeting with their lawyer. Rather, they were elected officials investigating the reasons for executive behavior.

The Eighth Circuit's recent decision in *In Re Grand Jury Subpoena Duces Tecum (Office of President v. Office of Indep. Counsel)*, *supra*, is helpful. In that case, the Independent Counsel moved to compel the production of notes taken during meetings pertaining to several Whitewater-related subjects and attended by White House lawyers, the

President's wife, and her lawyers. Both the White House and the President's wife moved to block production of the notes on the basis of the attorney-client privilege. They relied in part on the common-interest doctrine, which expands the coverage of the attorney-client privilege where two or more clients with a common interest in a matter are represented by separate lawyers and agree to exchange information concerning the matter. In such instances, a communication of any such client that otherwise would qualify as privileged is privileged as against third parties. 112 F.3d at 922 (citing *Restatement (Third) of the Law Governing Lawyers* § 126(1) (Proposed Final Draft No. 1, 1996)).

Writing for a divided panel, Judge Bowman rejected the assertion of the privilege in part because of disparity of interest between the White House and the President's wife. 112 F.3d at 922-23. Judge Bowman noted that the common interest necessary to invoke the privilege under such circumstances may be "either legal, factual, or strategic in character," but held that the standard had not been satisfied. *Id.* at 922 (citation omitted). He concluded that while the primary interest of the President's wife in the investigation was avoiding criminal conviction, the White House as an institution faced no such threat. *Id.* at 923.

Although the defendants have not asserted the common-interest doctrine in this case, the same sort of disparity of interest that led to the rejection of the privilege with respect to the White House meetings is also present here. This divergence precludes us from concluding that Councilmen Ross and Bratcher acted as clients of the city's lawyer during the December 1992 meeting. City Manager Haley and Chief Baxter participated in the discussion as the agents of the city responsible for making the promotion that led to this lawsuit. As fire chief, Baxter was the person ultimately responsible for devising and applying the Department's promotional policy. Exercising the discretion afforded him by the city charter, Haley accepted Baxter's recommendation and promoted Young. Thus, it is the conduct of Baxter and Haley that threatens to expose the city to liability.

Appendix A

Contrary to the statements made by our dissenting colleague, Councilmen Ross and Bratcher played no role in the promotion of Emmet Young. At the time of Young's promotion, the Murfreesboro city council served as a review board for appeals arising out of the hiring and firing of most city employees, including firefighters. There is no indication whatever in the record that the city council or individual councilmen played any role in firefighter promotions. In fact, in response to plaintiff Reed's EEOC complaint, the defendants stated that under the city charter, "the authority for promotions rests with the City Manager, exclusively." City's Resp. to EEOC charge, Baxter Dep. Ex. 21, R. 28. The factual representations to the contrary made in the dissenting opinion are in error. Councilmen Ross and Bratcher initiated the December 1992 conversation not to obtain the advice of the city attorney—who apparently participated in the meeting at the request of Haley and Baxter, Ross Dep. at 13-14, R. 26, J.A. at 80-81—but to inquire into the basis for the promotion of Young, which had apparently been challenged by their constituents as based on race.

In sum, the interests of Ross and Bratcher were adverse to those of Haley and Baxter, and the two councilmen were not clients of the city attorney with respect to the meeting of December 16, 1992. Because Councilmen Ross and Bratcher participated in the meeting as third parties, the discussion was not held in confidence for purposes of the attorney-client privilege. *See* 8 *Wigmore* § 2311 ("One of the circumstances[] by which it is commonly apparent that the communication is not confidential is the presence of a third person . . . ."). Their discussion is not shielded from disclosure by the attorney-client privilege.

The attorney-client privilege issue should be decided only on the basis of neutral principles of law, and not on the basis of the racial considerations recited in the last paragraph of the dissenting opinion. The situation might very well be in reverse—an African-American plaintiff could well be claiming discrimination in promotion. Our ruling on the attorney-client privilege should not be made to depend on "the

remedial purposes behind the Civil Rights Act" or whether the city needs to "maintain diversity," as our dissenting colleague suggests. Our ruling on this narrow issue should be color blind and not personal, subjective, or based on multi-cultural considerations.

The District Court's protective order and pretrial ruling rested on a misapplication of the law of the attorney-client privilege and denied plaintiffs the opportunity to develop their case fully at trial. We therefore VACATE the judgment of the District Court and REMAND the case for further proceedings consistent with this opinion.

Appendix A

DISSENT

NATHANIEL R. JONES, Circuit Judge, dissenting. The issue before this Court is one of first impression. The majority found that two city councilmen, acting in their official capacities, were third parties in a confidential meeting with the city attorney, and were thus not covered by the attorney-client privilege. Because I feel that the majority construed the attorney-client privilege too narrowly in this context, I respectfully dissent.

It is well settled that agents of a client are covered by the attorney-client privilege to the same extent as the client. *See, e.g., John Labatt Ltd. v. Molson Breweries*, 898 F.Supp. 471, 473 (E.D. Mich. 1995) (noting general rule that attorney-client privilege covers communications between client's representatives and client's lawyer). Additionally, the majority has recognized that private corporations and other organizations who are analogous to governmental entities may constitute clients for purposes of the attorney-client privilege. The majority has even recognized that this court has, in its only case addressing the attorney-client privilege in the governmental context, held that a city and city council were the same entity for the purposes of the attorney-client privilege and thus, as client's of the city attorney, a city council could invoke the attorney-client privilege. *See In re Grand jury Subpoena (United States v. Doe)* 886 F.2d 135 (6th Cir. 1989). Yet, the majority found that in this case, a meeting between two city council members, the city manager, city attorney and city fire chief concerning confidential legal advice and action, did not fall within the gambit of the attorney-client privilege. I disagree.

The majority's primary justification for holding that the privilege does not apply in this case is their belief that there is disparity of interest between the city councilmen and those whose activities directly affected the promotion at issue. The

majority cites *In Re Grand Jury Subpoena duces Tecum (Office of President v. Office of Indep. Counsel)*, 112 F.3d 910 (8th Cir.), *cert denied sub. nom*, 117 S.Ct. 2482 (1997) as support for that proposition. In that case, however, the President's wife, *in her personal capacity*, was attempting to assert the attorney-client privilege with regard to a meeting she had with the White House lawyer. *Id.* at 922. Mrs. Clinton did not allege that she was either an agent of the White House or acting in her official capacity as First Lady. Thus, she was not considered a client of the White House attorney. Mrs. Clinton, to the contrary, merely asserted that although a third party, the common interest doctrine covered her meeting with the White House attorney. *Id.* at 922. Here, the city councilmen do not have to rely on the common interest doctrine because they attended the meeting in their official capacity as city councilmen. The city council is clearly an agent of the City and as such, is a direct client of the city attorney. *Doe*, 886 F.2d at 138. Moreover, *In re Grand Jury Subpoena Duces tecum (Office of President v. Office of Indep. Counsel)*, involved application of the attorney-client privilege in the criminal context. As justification for a narrower reading of the attorney-client privilege, the court noted that it was significant that executive branch employees, including attorneys, were under a statutory duty to report criminal wrongdoing by other employees. 112 F.3d at 920. The court also specifically found that application of the attorney-client privilege in civil litigation would present a different issue. *Id.* at 917-918.

Furthermore, the fact that Councilmen Ross and Bratcher did not play a direct role in the promotion and therefore did not directly expose the City to liability does not remove them from the reach of the attorney-client privilege. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court rejected such a narrow application of the attorney-client privilege in the corporate context. In *Upjohn*, this court had determined that the "control group" rather than the broader "subject matter" test was applicable for measuring the scope of the attorney client privilege in the corporate context. *See United States v. Upjohn Co.*, 600 F.2d 1223, 1225 (1979),

rev'd 449 U.S. 383 (1980). Under the subject matter test all employees of the corporation were considered agents of the corporation, and if in possession of information acquired in the ordinary course of business relating to the subject matter of her employment and the information was communicated confidentially, were covered under the attorney-client privilege. *Id.* at 1226. Only if the communications did not cover communication of pre-existing documents prepared for independent business reasons, or communications unrelated to the subject matter of the agent's employment, were communications between the corporate attorney and the employee excluded from the reach of the privilege. *Id.* Under the narrower control group test, however, only those communications made by the "control group" of the corporation, "those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given," were covered by the privilege. *Id.* at 1226. The Supreme Court granted certiorari and rejected this Circuit's application of the narrow control group approach with regard to the attorney-client privilege in the corporate context. *See Upjohn Co.* 449 U.S. at 392-93. The Court noted that the control group test "frustrate[d] the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Id.* at 392. The court criticized the narrow scope given the attorney-client privilege in the court below because it "not only [made] it difficult for corporate attorneys to formulate sound advice when their client [was] faced with a specific legal problem, but [it] also threaten[ed] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Id.* Thus, the court found that the control group test was inapplicable and that because the communications in the case concerned matters within the scope of the employee's corporate duties, their communications with the corporate attorney were covered by the privilege. *Id.* at 394-95.

Upjohn provides clear reasoning for rejecting the majority's construction of the privilege in this case. Although not

directly in charge of promotions in the City, City Councilmen Ross and Bratcher are intricately involved in the process. All hires and fires of all city employees are subject to an appeal directly to the city council. The termination of Henry Knox was appealed to the city council and caused the opening for the promotion at issue in this case. Clearly, because the city council must vote on the propriety of promotions if contested, its members have not only an interest, but a duty to discuss the legal ramifications that may be relevant in making their determinations. As the city attorney in this case noted, "it is important that all members of the city council be furnished, by the attorney, all relevant facts upon which to make their decision." (J.A. at 35) (Reed Aff.). Simply because the full city council was not present and Ross and Bratcher were not directly responsible for making the initial promotion decision, does not remove them from the reach of the attorney-client privilege. Indeed, under the majority's reasoning it would be nearly impossible for a city council ever to invoke the attorney client privilege. In most instances, a full city council meeting must be open to the public, which is not conducive to confidential discussions. A city council member then, would only be able to seek confidential legal advice in a private meeting with the city attorney, such as the meeting between the councilmen and city attorney in this case. The majority, however, would prevent such a meeting from being covered by the attorney-client privilege.

Finally, the underlying facts of this case do not merit the majority's narrow construction of the attorney-client privilege in order to preserve justice. The facts clearly illustrate that the promotion policy was changed due to problems with the Fire Department's test, and not simply as an effort to obtain a Black candidate. Indeed, as the majority points out, Chief Baxter had two opportunities to choose a Black candidate, which he did not utilize, before finally choosing Emmet Young. That race may have even played a small role in his final decision in an effort to ensure that the Fire Department maintain diversity in the face of an opposite history, and is perceived by its citizens as welcome to all, is not illegal and is in fact one of the remedial purposes behind the Civil Rights

Act of 1964. The majority, in its rush to judgment, may well frustrate those very important ideals. Accordingly, I dissent.

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILE DIVISION ENTERED SEPTEMBER 3, 1996

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No: 3:93-0998

JOHN REED and HENRY SHARBER

vs.

DAVID BAXTER and CITY OF MURFREESBORO

MEMORANDUM

This action arises out of reverse discrimination charges brought by Plaintiffs, two white fire fighters employed by the Murfreesboro Fire Department, against the City of Murfreesboro and Fire Chief David Baxter ("Defendants"). Plaintiffs allege that they were discriminated against during Defendants' effort to hire a new Captain. The individual who ultimately received the promotion, Emmett Young, is black. Plaintiffs assert that the hiring process was discriminatory and violated Plaintiffs' rights under Title VII of the Civil Rights Act of 1964, as amended, 1991, Title 42 U.S.C. § 2000, *et seq.*

I. Background

In 1992 the Murfreesboro Fire Department (the "Department") sought to fill a vacant Captain's position. The Department informed prospective candidates that a combination

of test scores, seniority, and state certifications would be used to pick three finalists for the position, that those finalists would be interviewed by Chief Baxter, and that Chief Baxter would recommend an individual to City Manager, Roger Haley, for hiring. As part of the application process, Plaintiffs and others took a written test on December 3, 1992. Plaintiffs both scored well on the test but were not ultimately selected as finalists for the promotion. The results of the written test were ultimately given less weight in the selection of finalists than had originally been expected. Defendants assert that the change in the selection process was due to structural flaws in the test and errors in test scoring. Plaintiffs contend that this change was part of an effort to discriminate against white job applicants.

On December 3, 1992, Chief Baxter received the social security numbers of the three candidates most qualified for the promotion based on the original promotion criteria. Those candidates included John Swader, who is black; Henry Sharber, who is white; and Thomas Adams, who is white. Transcript of Evidence from June 19, 1996 Hearing ("Transcript of Evidence"), p. 8. On December 4, 1992, Training Officer Vinson determined that one of the candidates whose name had been referred to the Chief had been referred in error. After Chief Baxter learned of this error, he requested a revised list, this time including the top five candidates using the original criteria. This list included two black applicants and three white applicants. Transcript of Evidence, pp. 11-12; 65-68. Emmett Young was not on either of these lists.

As the promotion process continued, increasing controversy arose regarding the results of the written test. The Promotion Board decided that five of the 100 questions had multiple answers and that everyone should be given credit for those

questions. Transcript of Evidence, p. 104; Defendants' Exhibit 9. Eddie Mitchell, a white applicant, filed a grievance alleging that the test was structurally unfair. Transcript of Evidence, p. 72. The Grievance Committee held a heating on December 8, 1992 regarding the fairness of the test and subsequently issued an advisory opinion concluding that the test was unfair and should be held null and void. Transcript of Evidence, p. 74; Defendants' Exhibit Number 7. Finally, Officer Vinson, while reviewing test results with each applicant, determined that four more tests had been incorrectly scored. Transcript of Evidence, p. 78.

In response to these problems, Chief Baxter investigated the option of obtaining a professionally generated test but determined that the time and cost involved rendered that option unacceptable. *See* Transcript of Evidence, p. 64. Instead, Chief Baxter directed Officer Vinson to determine whether all applicants had obtained a passing score of at least 70 on the test. Upon learning that they had, the Chief determined that all applicants would receive equal credit for the written test. Finally, the Chief instructed Officer Vincent to give him a list of the top three applicants using the remaining hiring criteria, length of service and number of fire certifications. The finalists based on these criteria were Thomas Adams, Thomas McClain, and Emmett Young. Neither of the Plaintiffs were finalists according to these criteria.

Chief Baxter interviewed Mr. Adams, Mr. McClain, and Mr. Young on December 14, 1992. On December 15, 1992, Chief Baxter recommended to City Manager Roger Haley that Emmett Young receive the promotion. At that time, Mr. Young had 18 years of service with the City of Murfreesboro and had previously served as an Instructor/Captain in 1987. Transcript

of Evidence, pp. 55-56, 80; Defendants' Exhibit Number 13. Emmett Young was promoted on December 15, 1992.

II. Analysis

In order to prove disparate treatment regarding promotional opportunities, Plaintiffs must establish a prima facie case by showing, by a preponderance of the evidence, that (1) Plaintiffs belong to a protected class; (2) Plaintiffs applied for and were qualified for an available position; (3) Plaintiffs were rejected; and (4) following Plaintiffs' rejection, the position remained open and the employer continued to seek applications from similarly situated individuals outside of Plaintiffs' protected class. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973). In addition, Plaintiffs must present evidence of discriminatory intent on the part of Defendants. *Lynch v. Freeman*, 817 F.2d 380, 382 (6th Cir. 1987); *see International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335; 97 S.Ct. 1843, 1854 (1977).

If Plaintiffs establish a prima facie case, then the burden shifts to Defendants to articulate some legitimate, non-discriminatory reason for their actions. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824. To satisfy this burden, Defendants must present evidence that raises a genuine issue of fact as to whether Defendants discriminated against Plaintiffs. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 1094 (1981).

Once Defendants proffer non-discriminatory explanations for their actions, the burden shifts back to Plaintiffs to establish that Defendants' justifications for the challenged decision are a mere pretext for discrimination. Plaintiffs may meet this burden

by convincing the Court by a preponderance of the evidence that Defendants' refusal to promote Plaintiffs was motivated by discrimination or that Defendants' proffered justification for the promotion decision is unworthy of credence. *Postal Serv. Board of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 1483 (1983) (Blackmun, concurring). In order to show that Defendants' proffered reasons are pretextual, Plaintiffs must show not only that Defendants' explanations are inaccurate, but also that the resulting absence of legitimate explanation for the challenged employment decision warrants a finding of discrimination. *Sims v. Cleland*, 813 F.2d 790, 793 (6th Cir. 1987). Where two or more alternative and independent legitimate, nondiscriminatory reasons are articulated by a defendant employer, the falsity or incorrectness of one may not impeach the credibility of the remaining articulated reasons. *Id.* While the burden of proof shifts from Plaintiffs to Defendants and back to Plaintiffs throughout the litigation, the burden of persuasion remains at all times with Plaintiffs. *See Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 997, 108 S.Ct. 2777, 2790 (1988). Within this framework, the Court considers whether Plaintiffs have carried their burden in this matter. The Court finds that they have not.

The Court concludes that Plaintiffs have not established a prima facie case. Plaintiffs have failed to show that they were qualified for the promotion based on the revised hiring criteria. Given the problems with the test discussed above, Chief Baxter determined that all individuals who received a passing score of at least 70 should receive equal credit for the written test. Thereafter, the seniority and state certifications of each candidate were considered and the three most qualified candidates according to these criteria received interviews. The fact that Plaintiffs were not among the three most qualified candidates

based on the revised criteria prevents them from establishing a prima facie case.

Even if Plaintiffs were able to establish a prima facie case, the Court finds that Plaintiffs would be unable to ultimately carry their burden of persuasion. Defendants have offered legitimate nondiscriminatory explanations for restructuring the promotion process. Specifically, Defendants have indicated that they sought to minimize the impact of test problems. Plaintiffs have not shown that this explanation is unworthy of credence.

The credibility of Defendants' explanation for revising the promotion criteria is enhanced by the fact that throughout the selection process Defendants had the opportunity to hire African Americans who were finalists based on the original hiring criteria. A black applicant, John Swader, was on the original list of three candidates. Transcript of Evidence, p. 8. Two black applicants, John Swader and Thomas McClain, were on the list of five candidates. Transcript of Evidence, pp. 11-12. Had the Department's goal been to hire a black Captain, the Department could have done so using either of the previously-generated lists.

To the extent that Defendants may have favored Emmett Young based on his prior service to the City regarding Mary Madding, Transcript of Evidence, pp. 35-36, the Court notes that such favoritism is not prohibited by Title VII. If Defendants preferred Mr. Young on the basis of his personal character or because he had testified for the City, that is not sufficient to prove Title VII discrimination. Any reason for hiring Mr. Young "is legitimate for purposes of the civil rights laws if it is nondiscriminatory, even if it is mean-spirited, ill-considered, inconsistent with humane personnel policies, or otherwise

objectionable." *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275, 282 (6th Cir. 1991), *cert. denied*, 503 U.S. 945, 112 S.Ct. 1497 (1991).

Finally, the Court notes that Mr. Young was highly qualified for the promotion. Mr. Young had previously held a position of Captain, unlike the Plaintiffs or the other two highest ranking candidates on the final list, and had proven his ability to handle the responsibilities. Transcript of Evidence, pp. 55-56, 80. In addition, he had significant experience with the Department.

Based on Mr. Young's qualifications for the position and evidence of flaws in the written test, the Court finds that Plaintiffs' allegations that Defendants discriminated when they revised their promotion criteria and when they promoted Mr. Young lack merit. While the Court finds that the hiring process used in this matter was imperfect, the Court concludes that it was not illegal. Accordingly, the Court rejects Plaintiffs' claims.

IV. Conclusion

In entering judgment for Defendants, the Court concludes that Plaintiffs have been unable to prove that Defendants engaged in discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 1991, Title 42 U.S.C. § 2000, *et seq*. The Court finds that the promotion process used by Defendants was not discriminatory in purpose or function. The Plaintiffs have failed to establish a prima facie showing of discrimination in that they did not pass the Supreme Court threshold test. However, even if they had passed that threshold, they failed to discredit the nondiscriminatory reasons proffered by the defense.

Appendix B

Accordingly, the Complaint of Plaintiffs, John Reed and Henry Sharber, is hereby dismissed.

An Order consistent with the foregoing reasoning will be entered contemporaneously with this Memorandum.

Entered this the 3rd day of September, 1996.

s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION ENTERED SEPTEMBER 3, 1996

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No: 3:93-0998

JOHN REED and HENRY SHARBER

vs.

DAVID BAXTER and CITY OF MURFREESBORO

ORDER

Pending before the Court are Plaintiffs' claims of employment discrimination. Plaintiffs assert that the hiring process utilized by the Murfreesboro Fire Department was discriminatory and violated Plaintiffs' rights under Title VII of the Civil Rights Act of 1964, as amended, 1991, Title 42 U.S.C. § 2000, *et seq.*

In accordance with the reasoning set forth in the contemporaneously entered Memorandum, the Court concludes that Plaintiffs' claims lack merit. Accordingly, the Complaint of Plaintiffs, John Reed and Henry Sharber, is hereby DISMISSED, with the assessment of costs against the Plaintiffs.

Entered this 3rd day of September, 1996.

s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 5, 1998

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

96-6384

JOHN W. REED, ET AL.,

Plaintiffs-Appellants,

v.

DAVID BAXTER, INDIVIDUALLY, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: MERRITT, JONES, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the

case. Accordingly, the petition is denied. Judge Jones would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT
s/ Leonard Green
Leonard Green, Clerk